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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1912

JEFF EARL CARVER,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

The petitioner, Jeff Earl Carver, prays that a Writ of Certiorari be issued to review the judgment of the Court of Criminal Appeals in the above-entitled cause on May 1, 1974.

OPINIONS BELOW

The Court of Criminal Appeals of Texas delivered its opinion on May 1, 1974, affirming the case, which is reproduced as Appendix A, *infra*. The Appellant's Motion for Leave to File Motion for Rehearing was overruled by said Court on May 22, 1974, which said Order is reproduced as Appendix B, *infra*. These opinions are not yet reported.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on May 1, 1974, reproduced as Appendix A, *infra*. Subsequently, the petitioner filed his Application for Leave to File Motion for Rehearing, which was denied by said Court on May 22, 1974, without a written opinion. Appendix B. On May 23, 1974 that Court granted a 30 day stay of the issuance of its "mandate and all other proceedings upon the judgment against the Appellant for a period of thirty (30) days from this date in order that he may apply to the Supreme Court of the United States for a Writ of Certiorari." Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

I. WHETHER THE PRIOR RECORDED TESTIMONY OF THE ABSENT WITNESSES TUE AND ROGERS WAS PROPERLY ADMITTED IN EVIDENCE UNDER THE EXCEPTION TO THE SIXTH AMENDMENT CONFRONTATION REQUIREMENT RECOGNIZED IN *BARBER V. PAGE*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

A. Whether testimony of absent and unavailable witnesses, recorded at a previous juvenile jurisdiction certification hearing under TEX. REV. CIV. STAT. ANN. Art. 2338-1, Sec. 6, (wherein guilt or innocence and self-defense are not relevant issues) comes within the ex-

ception to the confrontation requirement of the Sixth Amendment, which allows the admission in evidence of testimony recorded in a prior trial of the same defendant.

B. Whether the state made a good faith effort to produce the witnesses at trial, so that the witnesses were "unavailable", within the exception to the confrontation requirement of the Sixth Amendment, if the armed services would permit the witnesses to appear but would not advance funds, the state law does not authorize the state or county to advance funds to out-of-state witnesses prior to the time of their appearance, and, the state prosecutorial authority, knowing of these matters, fails to request the armed services to direct the witnesses to appear.

II. WHETHER THE COURT OF CRIMINAL APPEALS APPLIED THE CORRECT RULE OF DECISION IN DETERMINING "HARMLESS ERROR" IN THIS CASE, SPECIFICALLY, WHETHER THE PROPER RULE OF DECISION IS THAT ARTICULATED IN *FAHY V. CONNECTICUT*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), OR WHETHER *HARRINGTON V. CALIFORNIA*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) ALTERED THE RULE FOR DETERMINING THE PRESENCE OR ABSENCE OF "HARMLESS ERROR".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Sixth Amendment,:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... to be confronted with the witnesses against him; ..."

2. United States Constitution, Fourteenth Amendment, Sec. 1:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; ..."

3. Texas Revised Civil Statutes, Anno., Art. 2338-1, Sec. 6. (*See* Appendix D., *infra*).

STATEMENT OF THE CASE

Petitioner was indicted for the offense of murder with malice aforethought; he was convicted of murder without malice.

The evidence showed a confrontation on the athletic field between Jeff Earl Carver and Willie Lee Collier. The deceased threatened the petitioner. Thereafter, another confrontation occurred in the gymnasium, where the deceased came up to the petitioner with a box opener, a tool with a razor blade in it and a handle on it, and cut the petitioner, saying "I am going to kill you later, white boy." The petitioner was "The most scared I have been in my life." The petitioner

left, joined his friends John Tue and Randy Rogers, went to his home, got a gun, returned to the school, and shot the deceased.

The petitioner testified at the trial of the case that he shot the deceased in self-defense to a continuing threat. The witnesses Tue and Rogers testified at the juvenile hearing and made statements which if believed, showed that the petitioner had a deliberate intent to kill the deceased, and which were destructive of the petitioner's defense. Tue and Rogers were not present to testify upon the trial on the merits, and their testimony, given at the jurisdictional hearing, was read to the jury, over petitioner's objection.

The testimony of Rogers and Tue was recorded at a hearing to certify the petitioner for trial as an adult, pursuant to Tex. Civ. Stat. Ann., Art. 2338-1, Sec. 6. The merits of the case, including guilt or innocence, and self-defense, are irrelevant in such a proceeding; according to this statute, the certifying juvenile court shall consider only those matters set out therein. The certifying court refused to allow cross-examination of the witnesses on the merits of the case, including self-defense. The trial court admitted this prior recorded testimony over the petitioner's timely objection.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT ERRONEOUSLY ADMITTED IN EVIDENCE THE PRIOR RECORDED TESTIMONY OF THE THEN ABSENT WITNESSES TUE AND ROGERS IN VIOLATION OF

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The testimony of the absent witnesses was recorded at a previous juvenile jurisdiction certification hearing under TEX. REV. CIV. STAT. ANN. Art. 2338-1. Sec. 6, (wherein guilt or innocence and self-defense are not relevant issues) and not at a prior trial of the defendant for the same charge, and therefore does not come within the exception to the confrontation requirement of the Sixth Amendment, which allows the admission in evidence of testimony recorded in a prior judicial proceeding against the defendant.

The trial court admitted into evidence the prior recorded testimony of Jerry Randall Rogers and John Wayne Tue taken at the prior hearing to determine jurisdiction in this case. The Appellant objected to such testimony because admission of such testimony violated the Appellant's right under the Sixth Amendment to the U. S. Constitution and Article I, Section X of the Texas Constitution, to be confronted by the witnesses against him, and because the State failed to lay a proper predicate for the admission of such testimony. The trial court overruled the Appellant's objection, to which action of the Court the Appellant duly excepted.

The Appellant contended that the trial court erred in admitting this testimony because the state failed

to lay a proper predicate for admission of such testimony.

The Sixth Amendment to the United States Constitution, as applied to the state through the Fourteenth Amendment, *Pointer v. Texas*, 380 U. S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965), requires that the defendant in a criminal prosecution be afforded the right to confront and cross-examine the witnesses against him through his counsel. "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by the defendant." *Barber v. Page*, 390 U. S. 719, 722, 88 S.Ct. 1318, 1320 (1968). "A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber v. Page*, supra, at page 725, 88 S.Ct. 1318 at 1322 (1968). Petitioner contends that the trial court erred in admitting the prior recorded testimony of the witnesses. The testimony was recorded at a hearing even less searching than an examining trial, with a far more limited function. Because of the nature of this preliminary hearing, the petitioner was not a defendant in that proceeding, and was not afforded an adequate opportunity to cross-examine the witness on the merits of the case. For these reasons, petitioner contends that this case does not come within the exception allowing admission of prior recorded testimony, and that the admission of the prior recorded testimony

of the absent witnesses violated the Sixth and Fourteenth Amendments.

The state failed to prove that the petitioner was a defendant at the prior hearing at which this testimony was recorded. The record reflects that the testimony of the witnesses Tue and Rogers was recorded at a juvenile jurisdictional hearing and not an examining trial for the offense here indicted. At this jurisdictional hearing, the petitioner was not charged with murder with malice, the charge in this case. The indictment in this case was not returned against the petitioner until after the juvenile certification hearing at which the objectionable testimony was recorded. This hearing at which the objectionable evidence was recorded was solely for the purpose of determining jurisdiction of the petitioner in the event that he should be indicted. *See* TEX. REV. CIV. STAT. ANN. Art. 2338-1 Sections 6 and 13 (1971). The Juvenile jurisdictional hearing is a separate and distinct proceeding from the examining trial, as reflected by Section 6(j) of Art. 2338-1, *supra*, as follows:

> "(j) If the juvenile court waives jurisdiction (pursuant to a hearing under Sec. 13) it shall certify its action, ... However, the examining trial shall be conducted by the district court or criminal district court which may remand the child to the jurisdiction of the juvenile court."

TEX. REV. CIV. STAT. ANN. Art. 2338-1, Sec. 6(j) (1971). The objectionable testimony of these witnesses

was not taken at an examining trial proceeding under TEX. CODE CRIM. PROC. ANN. Art. 16.01 (1966), but rather a jurisdictional hearing under TEX. REV. CIV. STAT. ANN. Art. 2338-1, Sec. 6 (1971). Because this testimony was not given at a prior trial at which the petitioner was charged with murder with malice it is inadmissible, because the prior proceeding was not against the petitioner as a defendant. The state failed to lay a proper predicate for the admission of this testimony by failing to show that the testimony of Tue and Rogers was taken at a prior hearing or trial in which the Appellant was charged with murder with malice. The prior proceeding was not against the "same defendant."

The trial court erred in admitting this testimony because the state failed to lay a proper predicate for its admission by failing to prove that the petitioner was afforded an adequate opportunity at the jurisdictional hearing to cross-examine these witnesses as to matters concerning the charge of murder. The state must prove that the petitioner had an adequate opportunity to cross-examine at the prior hearing before any prior testimony taken at such hearing may be admitted. *Pointer v. Texas,* 380 U. S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Because of the nature of the jurisdictional hearing the petitioner could not cross-examine these witnesses on matters concerning the charge of murder with malice. As discussed above, the sole purpose of the juvenile hearing at which this testimony was recorded was to determine jurisdiction, and whether to certify the petitioner for trial as an adult. The issues relevant to such hearings are enumerated

at TEX. REV. CIV. STAT. ANN. Art. 2338-1, Sec. 6 (h) (1971). Guilt or innocence, and defensive matters, including self defense to a continuing threat (asserted by petitioner at trial) are not matters relevant to the juvenile hearing. The record reflects that at one point counsel for petitioner attempted to cross-examine the witness on matters of self defense and the reputation and character of the deceased. The judge of the jurisdictional hearing sustained the objection of state's counsel that such matters were "immaterial to this case." Mr. Clinton, co-counsel for petitioner, who appeared at the jurisdictional hearing, testified that because of his understanding of the nature and purpose of the jurisdictional hearing, he specifically refrained from cross-examining these witnesses on matters relative to guilt or innocence of the charge of murder with malice later returned by indictment. He testified that because of his understanding of the hearing, his cross-examination was not as thorough and complete as it would be at a trial on the merits and did not include examination on defenses to a charge of murder. Further, under oath, co-counsel stated his opinion as a qualified expert and member of the State Bar of Texas that additional cross-examination of the witnesses Tue and Rogers was "essential, absolutely critical" to the defense of the case on the merits. Certainly co-counsel could not be expected to pursue adequate cross-examination in the face of the specific ruling of the juvenile court that matters of defense were "immaterial to this case." Because of the nature of the hearing, petitioner was not afforded an adequate opportunity to cross-examine Tue and Rogers. Since such cross-examination was not possible, the prior recorded testimony of these

witnesses is inadmissible under the rule in *Pointer v. State, supra.* In this respect, the state again failed to lay a proper predicate for this testimony. The trial court, therefore, erred in admitting the testimony of Tue and Rogers, taken at the juvenile jurisdictional hearing.

B. The state did not make a good faith effort to produce the absent witnesses at trial, so the witnesses were not "unavailable" within the meaning of the exception to the confrontation requirement of the Sixth and Fourteenth Amendments, recognized in *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

Because the state failed to make a good faith effort to secure the attendance of these witnesses, the state failed to show that they were "unavailable" within the meaning of *Barber v. Page,* 390 U. S. 719, 88 S.Ct. 1318 (1968). In *Barber v. Page*, this Court ruled that an absent witness is not "unavailable" for purposes of the exception to the confrontation rules unless the state has made a good faith effort to secure his attendance and has been unsuccessful. The court held that admission of prior testimony of an absent witness, recorded at an examining trial, violates the Sixth and Fourteenth Amendments to the U. S. Constitution, unless the State brings itself within the exception to such rule by attempting unsuccessfully to have the witness present for the trial on the merits. The *Barber* case ruled that the state failed to show a witness "unavailable" because the state had failed to avail itself of available

legal process to compel attendance, including the writ of habeas corpus *ad testificandum,* or the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings.

The record in this case shows that the State did not attempt to secure the presence of Tue and Rogers at this trial. The record reflects that the state obtained a continuance of the case on July 21, 1972, because of the absence of these same two witnesses. At that time the state made no attempt to comply with the Uniform Act to compel the attendance of out of state witnesses in criminal cases, although there was testimony that the witnesses were outside Texas and in the service at that time. The record further reflects that the state did not make any application for out of state witnesses as to Rogers and Tue between the date of the continuance, July 21, 1972, and October 20, 1972.

Additionally, the state did not make request upon the Judge Advocate General, Dept. of the Navy, for an order directing Tue to appear. While state's exhibits 1-6 reflect that the state filed Applications for Subpoenas for these witnesses, and Mr. Cherry, the District Attorney, testified to communication with the Judge Advocate of the United States Marine Corps Commandant's Office, cross-examination of Mr. Cherry demonstrated that the state in fact did not attempt to comply with the process for securing service witnesses and did not request their presence.

> Q. All right. Have you requested the Judge Advocate General, Department of the Navy, Washington, D. C., have you requested him to direct Private First Class Tue to appear in Lubbock?
> A. No.

The District Attorney attempted to excuse this inaction by testifying over the objection that the evidence was hearsay, that the Marine Corps could not provide funds for witness transportation and that the state would be required to advance funds to the witnesses prior to their testimony. The District Attorney argued that the County could not advance funds to these witnesses prior to the performance of their duties as witnesses, relying on TEX. ATT'Y GEN. OP. M-863 (1971). This argument does not suffice to admit the objectionable testimony in this case, just as it did not in *Barber v. Page, supra.*

> In this case the state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. . . . as Judge Aldrich, sitting by designation, pointed out in dissent below, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." 381 F. 2d, at 481. In short, a witness is not "unavailable" for purpose of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.

Barber v. Page, 390 U. S. 719, 88 S.Ct. 1318, 1322 (1968). In the case at bar, the *possibility* that the service would refuse cooperation for lack of funds, "is not the equivalent of asking and receiving a rebuff" and the record reflects that the state did not ask the service to direct the witnesses to attend the trial. Therefore, the witnesses were not "unavailable" for purposes of the exceptions to the confrontation rules of the Sixth and Fourteenth Amendments because the prosecutorial authorities did not make a good-faith effort to obtain their presence at trial.

In *Barber v. Page, supra,* the petitioner was denied an opportunity to cross-examine the absent witnesses at the trial and at the examining trial at which the testimony was recorded. The unanimous court, however, stated that the result in the case would have been the same in the case even if the Appellant had cross-examined the absent witness at the examining trial. The court emphasized that an examining trial is not a trial on the offense charged and by reason of its limited purpose, does not offer an adequate opportunity for cross-examination. In a unanimous opinion the Court remarked that

> [t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause ex-

> ists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause if the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

Barber v. Page, 390 U. S. 719, 88 S.Ct. 1318, 1322 (1968).

The reasoning of the court in *Barber* further explains the reason for the rules, above discussed, requiring that the prior recorded testimony must be taken at a prior hearing at which the defendant had an adequate opportunity for cross-examination and was charged with the same offense. In this regard, this court should again recall that the testimony here complained of was recorded at a jurisdictional hearing under TEX. REV. CIV. STAT. ANN. Art. 2338-1, Sec. 6 (1971) and not an examining trial under TEX. CODE CRIM. PROC. ANN. Art. 16.01 (1966), at a time prior to indictment. As discussed above, that jurisdictional hearing, by its very nature, was not a "searching exploration into the merits of [the] case."

Furthermore, the state should not be heard to claim a good faith effort in this case, even if the prosecutor could not advance funds to these absent witnesses, according to the Attorney General's interpretation of statute. It is true that the amount of funds appropriated for such purposes is within the discretion of the legislature, TEX. ATT'Y GEN. OP. NO. WW-113 (1957), and the question of advancement of fees to out of state

witnesses, prior to the performance of their duties, is a question for the legislature, TEX. ATT'Y GEN. OP. NO. M-863 (1971). The state, however, may not constitutionally, through its legislature, refuse to take all steps possible to secure attendance of these witnesses, specifically refusing advancement of funds, and still use the prior recorded testimony of absent witnesses at this trial. The District Attorney in this case is an officer of the state, representing the state in this case. The state, through its officer, the District Attorney, should not be heard to assert its own inaction and refusal of its legislature to advance funds for out of state witnesses as an excuse for the absence of the witnesses, and then in the next breath claim a good faith effort to secure their attendance.

Petitioner contends that the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment require that before the state may introduce prior recorded testimony of any alleged "unavailable witness", the state must appropriate and advance funds to insure those witnesses' attendance. Certainly this is the plain inference from *Barber v. Page, supra*. The witnesses were not "unavailable" within the meaning of *Barber v. Page, supra*, unless the state, through its prosecutor, made a good faith effort to secure their attendance, including advancing funds for transportation to the trial. The state may not have the matter both ways. If the state determines not to appropriate or advance funds, then the State's prosecutor should not be heard to claim unavailability of the witnesses and good faith effort to secure attendance; the State has elected to forego

prior recorded testimony in such a case. To admit prior recorded testimony of these witnesses because the State of Texas refuses to advance funds for their attendance is a denial of due process of law under the Sixth and Fourteenth Amendments.

The requirement of appropriation of funds by the State to protect the rights of a defendant, under the Sixth and Fourteenth Amendments, is not foreign to our jurisprudence. The state is required by the Sixth and Fourteenth Amendments to provide counsel for indigent defendants in criminal cases. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin,* 92 S.Ct. 2006 (1972). The state is required by the Sixth and Fourteenth Amendments to provide the criminal defendant with compulsory process for obtaining witnesses in his favor. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). In *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), this court held that the due process and equal protection clauses of the Fourteenth Amendment require the state to provide, free of charge to indigents, a stenographic copy of the transcript on appeal. Since the state is required, under the Sixth and Fourteenth Amendment, to take these affirmative steps to protect the rights of a defendant, in cases where such state action is of no aid and possibly a detriment to the prosecution's case, certainly under the rationale of *Barber v. Page, supra, Gideon v. Wainwright, supra,* and *Griffin v. Illinois, supra,* the state should be required to take affirmative steps to protect the Sixth Amendment right to confrontation, including advancement of funds to state's witnesses, when the

state wishes to use these witnesses' testimony against the defendant and for the benefit of the state's case.

II. IN DETERMINING THE PRESENCE OF "HARMLESS ERROR" IN THIS CASE, THE COURT OF CRIMINAL APPEALS APPLIED AN ERRONEOUS RULE OF DECISION HERETOFORE SPECIFICALLY REJECTED BY THIS COURT IN *FAHY V. CONNECTICUT*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171.

The Court of Criminal Appeals, in its opinion of May 1, 1974, did not discuss or rule on the Sixth and Fourteenth Amendment violations stating that "the error, if any, was harmless error beyond a reasonable doubt under *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d. 284 (1969)." "The right of confrontation may not be dispensed with so lightly ...", *Barber v. Page, supra*, at 725, 88 S.Ct. at 1322. For as Mr. Justice Black cautioned in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d. 705 (1967)," ... we must recognize that harmless-error rules can work very unfair and mischievous results, ..." *Chapman v. California, supra* at 22, 87 S.Ct. 824 at 827. Appellant contends that the record in this case reflects harm to the petitioner from the Sixth Amendment violation complained of above. Appellant contends that this court erred in holding such error "harmless."

The Court of Criminal Appeals ruled in this case that "[t]he 'untainted evidence provided overwhelming support for the conviction so that we may declare beyond a reasonable doubt that the error, if any, was

harmless.' " This approach is not the correct rule for decision in this case; the lower court is in error in considering evidence in this cause other than the testimony complained of. The proper rule of decision to be applied to this case in determining whether there was "harmless" or reversible error is that rule of decision articulated in *Fahy v. State of Connecticut*, 275 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), and explained in *Chapman v. State of California*, 386 U.S. 263, 87 S.Ct. 824 17 L.Ed.2d 705 (1967). The Case of *Harrington v. California, supra*, basis of the state court's ruling, does not control this case and does not require or support a ruling that the constitutional error in this case was harmless. The Supreme Court in *Harrington* merely attempted to apply to the facts of that case the principles and rule of decision previously established in *Chapman, supra* and *Fahy, supra;* it did not alter the test for determining the presence or absence of harm. The court in *Harrington* specifically reaffirmed the rule of decision in *Chapman* and limited *Harrington* to its facts; therefore, *Harrington* carries no precedential authority beyond its own facts.

> We do not depart from *Chapman;* nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence on all the ingredients of the crime is tendered, the use of cumulative evidence, thought tainted, is harmless error. Our decision is based on the evidence in this record.

Harrington v. California, supra at 254, 89 S.Ct. 1726 at 1728-1729. *Chapman,* in turn, specifically followed, explained and re-expressed the rule of *Fahy, supra.*

> There is little, if any, difference between our statement in Fahy v. State of Connecticut, about "whether there is a reasonable possibility that the evidence complained of contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy,* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman v. California, supra at 24, 87 S.Ct. at 828.

The Supreme Court in *Chapman* noted that the California courts had "neutralized" the harmless error rule by "emphasis and perhaps overemphasis, upon the [California] court's view of 'overwhelming evidence.' " *Chapman, supra* at 23, 87 S.Ct. 824. The court stated that they "prefer the approach of ... *Fahy v. State of Connecticut,* ..." in determining what is harmless error. Thus, in *Chapman,* the Supreme Court expressly rejected the "untainted evidence ... overwhelming support" approach adopted by the state court in this case, in favor of the rule of decision an-

nounced in *Fahy, supra. Chapman, supra* at 23, 87 S.Ct. 824 n. 7.

In articulating the rule of decision for determining the presence or absence of "harmless" error in *Fahy*, the Supreme Court specifically avoided the approach which this court adopted in this case, stating

> [w]e are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

Fahy v. State of Connecticut, supra at 86, 87, 84 S.Ct. at 230. Clearly then, the state court erred in considering other evidence in this case, and applied an erroneous rule of decision to this case. The question in this case is not whether "[t]he untained evidence provided overwhelming support for the conviction" rather, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Of course, as the Supreme Court noted in *Chapman*, the beneficiary of the constitutional error carries the burden on this question. It follows that in order for a reviewing court to rule that the error here complained of was harmless, the court must be able to say beyond a reasonable doubt that there is no possibility that the error complained of contributed to the Appellant's conviction.

Appellant contends that it cannot be said beyond a reasonable doubt that the testimony of the witnesses Rogers and Tue did not contribute to the conviction of the Appellant. The only element of the offense in issue in this case was the element of criminal intent to kill. The testimony of Tue and Rogers was by far the most decisive evidence on the question of whether the Appellant acted with a criminal intent to kill the decedent. Therefore, it is reasonably possible, and in fact, probable, if not certain, that this evidence did contribute to the conviction in this case.

The jury, of course, might infer from the shooting that Appellant intended to shoot the deceased; but in Texas a person's guilt depends on the character of his intent and purpose at the time he acted. *Vinson v. State*, 55 Tex. Crim. 346, 117 S.W. 846 (1909). In Texas a killing may be in self-defense even though it is intentional. *Vinson v. State, supra; Sullivan v. State*, 365 S.W.2d 810 (1963); *Manis v. State*, 41 Tex. Crim. 614, 58 S.W. 81 (1900). "In self-defense, equally with unlawful homicide, the design to kill is formed prior to the act of killing, . . ." *Manis v. State, supra*, at 82; intent is a common element of criminal homicide and self-defense. The decisive question, determinative of guilt or innocence, is whether the petitioner acted with criminal intent. The fact of the shooting, when considered alone, is equally consistent with criminal homicide and defensive homicide. Though a jury might infer and find criminal intent from the fact of the shooting, exclusive of any other evidence in the case, a jury might just as reasonably doubt that the petitioner acted from criminal intent, and therefore fail to make

such an inference. Malice, as well as criminal intent, may be inferred from the use of a deadly weapon in a deadly manner. The jury failed to find malice in this case, when the shooting itself would support such an inference, it seems reasonably possible that they gave little weight to the evidence of the shooting, standing alone. If the jury was unpersuaded, by the fact of the shooting alone, that the petitioner acted with malice, it is reasonably possible that this evidence also carried little weight in the determination of the presence or absence of criminal intent. Therefore, it is reasonably possible that the testimony of Tue and Rogers on this issue contributed to the conviction.

The petitioner took the stand in his own defense. He related the threat on his life by the deceased. The Appellant stated that he acted in self-defense, that he had no criminal intent. He testified that he went into the school to find the deceased and that he really didn't know what he was going to do but that he thought that by showing the deceased the gun that it might offset the threat and that this was what he intended to do. The petitioner further testified that when he walked up to the deceased that he pulled out the pistol and tapped the deceased on his back with it and when the deceased turned around that he turned real quick and looked at the appellant with a mean look in his eyes — "The same kind of look he had when he had that knife on him." The petitioner stated that when he saw the look and all of the hate that was in it he remembered the look that the deceased had had in his eyes when he struck at him with the knife and that he was scared and that the deceased was

shot. The petitioner further stated, "I don't even remember pulling the trigger. I just ..." All through his testimony, the petitioner denied any criminal intent and asserted self-defense.

Reviewing the evidence to this point, it is clear that, exclusive of the testimony of Tue and Rogers, the evidence on the question of criminal intent to kill does not "overwhelmingly support the conviction". The petitioner denied criminal intent and there was evidence showing that the deceased had threatened the petitioner's life. There is, of course, the fact of the shooting itself; but this will support a finding of criminal homicide *or* self-defense. And, as previously argued, the jury apparently gave little weight to the fact of the shooting, standing alone, as they failed to infer malice from such evidence. Of course, there were eye witnesses to the *shooting;* but there can be no eye witnesses to the petitioner's intent in shooting the deceased. The petitioner's intentions and his state of mind at the time of the shooting must necessarily be inferred from his words and actions. In this sense the case is circumstantial. And in this respect, Tue and Rogers *were* the only incriminating witnesses for the state on the issue of criminal intent. The actions of the petitioner in shooting the deceased will equally support the conflicting inferences of criminal homicide or self-defense. Tue and Rogers, however, were the only witnesses who heard, and testified to, the petitioner's words prior to, during and after the shooting.

Tue and Rogers testified that the petitioner said that he intended to shoot the deceased; no other witness

testified to this. The petitioner denied making such a statement at any time. On this crucial question of intent, the testimony of Tue and Rogers is directly contrary to that of the petitioner. The verdict in this case may well have turned on the jury's determination of the credibility of the petitioner, and of Tue and Rogers, as their testimony was directly contradictory on the decisive issue of the case, self-defense and intent. Certainly, when the star witnesses for the state contradict the petitioner on a material and crucial issue of fact, credibility of the witnesses is a factor contributing to the verdict. Cross-examination is crucial when credibility is at issue. Demeanor evidence is crucial when credibility is in issue. And there was good reason for Appellant's counsel to desire cross-examination of Tue and Rogers regardless of their demeanor on the stand. The record shows that Tue and Rogers were accomplices to this offense, if any. They had an involvement in the acts leading up to the shooting, and good reason for wanting to portray the petitioner as the sole actor who repeatedly uttered statements indicating criminal intent. Cross-examination of Danny Webb, however, established that John Tue, the absent accomplice witness, did much of the talking prior to the shooting. Rogers testified that Tue was the one who told him of the threat on Jeff's life by the deceased. And it was John Tue who told Rogers that he and the petitioner were going to the house to get the gun. Despite this fact, there is almost complete absence of any cross-examination of John Tue and Randy Rogers on this disputed fact, so as to reflect whether this petitioner, or John Tue, made threatening statements indicating criminal intent. The very testimony of Rogers

in regard to Tue's statements before the shooting begs for cross-examination of Tue on the issue of the petitioner's intent and whether Tue or the petitioner made threatening statements.

The eye witness testimony of the shooting event is not decisive of the issue of criminal intent, although it will support such an inference. The testimony of the petitioner, and the evidence of the threat on the life of the petitioner strongly contradicts the inference of criminal homicide and places the question in issue. The only decisive and damaging evidence on the issue of intent came from the absent witnesses. The "overwhelming evidence" of guilt in this case is the tainted testimony of accomplice witnesses not subjected to cross-examination.

Harrington, supra, is distinguishable on its facts from this case, and since *Harrington* is limited to its facts and is distinguishable on its facts from this case, it should not control this case. In *Harrington*, the petitioner's presence at the scene of the armed robbery was not disputed; the only question in dispute, and the issue determinative of guilt or innocence, was whether Harrington actively participated in the holdup. Thus, *Harrington* turned on the resolution of a question of physical fact. This case, however, turns on the question of the petitioner's subjective state of mind, rather than an objectively determined question of physical fact. This case involves a question of self-defense to a continuing threat; *Harrington* did not. The guilt or innocence of this petitioner depends upon the jury de-

termination of his state of mind, a fact that of necessity, can only be inferred from other objective physical facts and the words and actions of the petitioner. *Harrington* contained limiting instructions in the Court's Charge instructing the jury not to consider the evidence complained of for any purpose in determining the guilt or innocence of the defendant Harrington; the evidence in this case was specifically introduced and admitted for consideration against the petitioner. *Harrington* was not such a circumstantial case; its decision did not turn on the determination of fact by inference. *Harrington*, therefore, does not determine the standard of what is harmless error and does not apply to this case; it was a decision based on its own facts and limited to its facts.

The record reflects that the state failed to avail itself of compulsory process for the attendance of the absent witnesses and failed to request their attendance. State statute prohibits the payment of witness fees to out-of-state witnesses prior to their testimony; the armed services were willing for the witnesses to attend the trial, but would not advance funds for their transportation. Knowing these facts, the state "prosecutorial" authorities did not request or attempt to compel the attendance of Tue and Rogers.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court issue its Writ of Certiorari to the Texas Court of Criminal Appeals to review this case.

Respectfully submitted,

Clifford W. Brown
BROWN & HARDING
1601 Broadway
Lubbock, Texas 79401

Thomas L. Clinton
Court Place
Lubbock, Texas 79401

ATTORNEYS FOR THE
PETITIONER

CERTIFICATE OF SERVICE

I, the undersigned, Clifford W. Brown, an attorney duly licensed and qualified to practice before the Supreme Court of the United States, as attorney for Petitioner, Jeff Earl Carver, certify that on the ____ day of June, 1974, I served a true copy of the Petition for Writ of Certiorari on the Honorable Alton Griffin, Criminal District Attorney of Lubbock County, Texas, Lubbock County Courthouse, Lubbock, Texas. Such service was made by United States Mail and consisted of depositing said document in the United States Mail Box with first class postage, pre-paid, addressed to the office of said Criminal District Attorney.

I further certify that on said date I served a true copy of such Petition for a Writ of Certiorari on the Honorable John Hill, Attorney General for the State of Texas, at his office in Austin, Texas, by depositing the same in the United States Mail Box with first class, air-mail postage pre-paid.

_____

CLIFFORD W. BROWN

APPENDIX A

OPINION

JEFF EARL CARVER, Appellant

NO. 47,770 Vs. Appeal from LUBBOCK County

THE STATE OF TEXAS, Appellee

Appellant was tried for murder with malice aforethought with the jury finding him guilty of murder without malice and assessing his punishment at five (5) years' confinement in the Department of Corrections.

The sufficiency of the evidence is not challenged. The record does show that on September 9, 1971, the 15 year old appellant, a student at Dunbar High School in Lubbock, was confronted by the deceased, Willie Collier, another student, who demanded a cigarette, searched the appellant's pockets, and made implied threats. Later, in the gymnasium the deceased again approached the appellant, struck him with a box opener, causing appellant's arm to bleed, and made threats to kill him.

Appellant, then in company with Jerry Rogers and John Tue, went to his home during the lunch period where he obtained a pistol. After lunch, the appellant returned to the school and during the afternoon ap-

proached the deceased in the hallway and shot him with the pistol, causing his death.

At the outset appellant contends his constitutional right of confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 10 of the State Constitution was violated when the trial court permitted, over objection, the testimony of Tue and Rogers given at a prior waiver of jurisdiction hearing in juvenile court conducted under Article 2338-1, Secs. 6 and 13, Vernon's Ann.C.S.[1]

If the witness has once testified in a case, on a preliminary hearing or on a former trial, and the accused was present and had the opportunity to cross-examine the witness, and such witness has since died, or resides out of the State, or has removed beyond the limits of the State, or cannot attend the trial by reason of age or bodily infirmity, or has been prevented from attending court through the act or agency of the other party, his testimony may be reproduced in a subsequent trial of the same case if the proper predicate be laid for its admission. See Article 39.01, Vernon's Ann.C.C.P.; 1 Branch's Ann.P.C., 2d ed., Sec. 98, p. 110. To be admissible it must be shown that the witness' testimony at the former trial or hearing was given under oath, that it was competent, that the accused was present and had adequate opportunity to cross-examine him through counsel, that the accused was the defendant at the former trial or hearing upon

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[1]This hearing is sometimes referred to as a discretionary transfer of jurisdiction hearing.

the same charge. See 24 Tex.Jur.2d, Sec. 698, p. 337; Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Such predicate must be clearly and satisfactorily established before such testimony can be reproduced. 1 Branch's Ann.P.C., 2d ed., Sec. 99, p. 112.

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the Supreme Court noted that this exception to the confrontation requirement "has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement."

Where the State seeks to reproduce testimony of an absent witness given at a prior hearing, it has the burden of establishing an exception to the right of confrontation. See Whitehead v. State, 450 S.W.2d 72 (Tex.Cr.App. 1969); Cumpston v. State, 235 S.W.2d 446 (Tex.Cr.App. 1951).

Recognizing the traditional exception to the confrontation requirement where a witness is unavailable and has given testimony in a previous judicial proceeding against the same defendant which was subject to cross-examination, the Supreme Court in *Barber, supra*, nevertheless held that "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."

Appellant contends that the State failed to lay the proper predicate for the introduction of such evidence by failing to show that the witnesses Tue and Rogers were unavailable and that their return to the jurisdiction of the court was indefinite. The State did offer testimony that the witnesses were in the United States Marine Corps, Rogers being in North Carolina and Tue being aboard ship off the coast of Vietnam. Appellant urges that this did not reflect their return was indefinite. Relying upon Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), he further contends the State failed to make a good faith effort to secure attendance of the witnesses and did not fully comply with the Uniform Act to secure attendance of witnesses from without the State in criminal cases. See Article 24.28, Vernon's Ann.C.C.P. The district attorney did testify he had forwarded subpoenaes to the commanding officers of the witnesses and was informed the Marine Corps would not have the prospective witnesses honor subpoenaes until the State advanced funds for travel, and, apparently relying upon some Attorney General's opinions, related there was no method by which money could be so advanced by the State.

Further, appellant charges that the State failed to show the appellant was a defendant on the same charge at the prior juvenile hearing on waiver of jurisdiction, and that this was also an essential part of the necessary predicate. He further contends that the State failed to show that he had an adequate opportunity at the juvenile court hearing to cross-examine the witnesses relative to the murder charge, as the purpose of the hearing was the issue of jurisdiction.

We need not discuss in detail each of appellant's contentions that the proper predicate was not laid for the reproduction of the witnesses' testimony, for we conclude that the error, if any, was harmless error beyond a reasonable doubt under Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

This was not a circumstantial evidence case. A number of witnesses described the events just prior to and after the shooting. Several were eyewitnesses. Tue and Rogers were not the only incriminating witnesses for the prosecution. The fact that the appellant went home, got a pistol, ate lunch at a hamburger stand, returned to school and shot Collier as Collier was backing away from him was not in dispute since the appellant testified and corroborated in essence the missing witnesses' testimony.

The "untainted" evidence provided overwhelming support for the conviction so that we may declare beyond a reasonable doubt that the error, if any, was harmless. See Whitehead v. State, supra.

Next, appellant contends that the court's charge improperly limited the consideration "that the jury could give to the condition of the Defendant's mind at the time of the killing."

Appellant notes the testimony of a psychologist who testified that an examination seven months prior to the alleged offense showed him to be "a very scared and very frightened child" of 15 years who was emo-

tionally immature and who, because of his size, expected to act older and more mature.

Despite the timely presented objections to the middle paragraph below, the court charged the jury in part as follows at the guilt-innocence stage of the bifurcated trial:

> "If you should find that the defendant was guilty of murder but you have a reasonable doubt as to whether the defendant, in committing the offense, if he did, was prompted by malice, then you should resolve that doubt in defendant's favor, and in such case you can find the defendant guilty of murder without malice aforethought.
>
> "In this connection, if you find from the evidence beyond a reasonable doubt that the defendant is guilty of murder, then you may consider the condition of defendant's mind at the time of the killing, if any, and, as going to show the condition of mind, you may take into consideration all the relevant facts and circumstances surrounding the killing, if any, and the previous relationship existing between the defendant and the deceased, if any, together with all relevant facts and circumstances in evidence.
>
> "If you have a reasonable doubt as to whether the defendant is guilty of murder at all,

> whether with or without malice aforethought, then you will find the defendant not guilty."

The appellant argues that "the charge in question literally instructed the jury that if they found Defendant guilty beyond a reasonable doubt of murder, they could *then* consider the condition of the Defendant's mind at the time of the killing. This could mean but one thing to the jury and this that they could consider the condition of his mind in determining whether the murder was with or without malice. This, of course, effectively denied any consideration by the jury of the condition of the Defendant's mind in relation to such issues as intent, premeditation and self defense. Certainly this part of the charge is calculated to mislead the jury."

Both the State and the appellant concede that the trial court was attempting to charge under the provisions of Article 1257a, Vernon's Ann.P.C. 1925, although punishment was not an issue at the guilt or innocence stage of the trial.

Article 1257a, supra, reads in part as follows:

> "In all prosecutions for felonious homicide the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at

the time of the homicide, *which may be considered by the jury in determining the punishment to be assessed.*" (Emphasis added)

At the time of the enactment of this statute in 1927 (Acts 1927, 40th Leg., p. 412, Ch. 274, Sec. 2) the unitary trial was in existence where both the issue of guilt and punishment were passed on at the same trial.

While some early cases held that a charge under Article 1257a should not be given, this court in Wheeler v. State, 239 S.W.2d 105 (Tex.Cr.App. 1951), held that it was not error to instruct the jury in accordance with the statute when limited to the issue of punishment. There, this court wrote:

"The legislature has the authority to prescribe rules of evidence, and if the effect of Art. 1257a, Vernon's Ann.P.C., be to limit the use of testimony as to facts and circumstances surrounding the killing and the previous relationship existing between the parties to the question of punishment, then such testimony could no longer be offered by the state or by the accused on the question of the condition of mind of the accused, on issues going to the question of guilt, such as on the issue of self-defense upon the theory of the appearance of danger; or upon any question other than that of punishment.

"We think it clear that the legislature had no such intention, but on the other hand intended,

in connection with the submission of malice aforethought and murder without malice, to point out the evidence mentioned as proper for consideration by the jury in arriving at the punishment to be assessed in the event the defendant was found guilty.

"In Spicer v. State, 120 Tex.Cr.R. 440, 46 S.W.2d 685, the provisions of Art. 1257a, Vernon's Ann.P.C., were given in the charge, the jury being instructed that such matters might be used in determining the punishment in the event they convicted the defendant.

"In Graham v. State, 121 Tex.Cr.R. 343, 51 S.W.2d 401, the jury was instructed that if they believed beyond a reasonable doubt that the defendant was guilty of murder they might take into consideration the condition of appellant's mind at the time of the killing, and as showing such condition of mind, all relevant facts and circumstances surrounding the killing and the previous relationship existing between the defendant and the deceased might be taken into consideration.

"The charge as here given authorized the consideration of the matters set forth in Art. 1257a Vernon's Ann.P.C., on the question of punishment 'if any' to be assessed 'in the event you convict the defendant.'

"Insofar as the Hill, Jamison, Riles and Scott cases hold that the substance of Art. 1257a should not be given in the charge, but should serve only as a guide to the court in passing upon the admissibility of testimony, they are, here now, expressly overruled.

"We hold with the Spicer and Graham cases that the charge as given in this case properly instructed the jury in the terms of the statute that they may consider the matters set forth therein in passing upon any punishment they may assess in the event they find appellant guilty."

Cf. Morris v. State, 246 S.W.2d 184, 186 (Tex.Cr.App. 1952).

Since the advent of the 1965 Code of Criminal Procedure with its bifurcated trial requirement, see Article 37.07, Vernon's Ann.C.C.P., some confusion prevailed at which stage of the trial a determination should be made of whether the murder was committed with or without malice since this finding determined the penalty to be assessed. See Foster v. State, 493 S.W.2d 812, 813 (Tex.Cr.App. 1973).[2]

According to the records of this court the most common practice was for the trial court to submit the issue

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[2]In Foster v. State, supra, at p. 813, the court stated:

"Since degrees of murder no longer exist, all voluntary killings being murder, the presence or absence of malice relates only to the punishment." (Cases cited omitted)

of malice aforethought and murder without malice at the guilt stage of the trial. In most instances there were no objections to such procedure. In Brazile v. State, 497 S.W.2d 302 (Tex.Cr.App. 1973), the defendant offered no evidence at the first stage of the bifurcated trial and the court instructed the jury on both murder with and murder without malice. At the penalty stage of the trial he was denied the right to offer evidence as to his version of the facts and circumstances surrounding the homicide as it bore on the issue of punishment. In reversing this court noted the holding of Foster v. State, supra, and stated that "it would appear to be proper to submit the issue of malice only during the punishment stage. . . ."

> "The fact that appellant uniquely chose to wait until the penalty hearing to present this evidence cannot be held against him now. The fact is, a reading of Art. 1257a, V.A.P.C., would probably lead to the conclusion that the penalty stage is the *proper* stage in which to introduce such testimony."

In the instant case, while appellant objected to the portion of the charge mentioned, we do not find any objection to the court submitting the issue of murder with and without malice at the guilt stage of the trial. While the issue of punishment was not then involved and it is questionable whether the charge in the form given should have been given, we cannot conclude, under the circumstances, that reversible error occurred. The issue of murder with or without malice was before

the jury at the time,[3] and the court's charge on self-defense and on justification on the grounds of threats clearly instructed the jury they were to consider such defenses from the standpoint of the appellant at the time he acted.

Considering the charge as a whole, we decline to hold that the instructions complained of improperly limited the jury's consideration of the appellant's state of mind. See and compare Wingate v. State, 487 S.W.2d 89 (Tex.Cr.App. 1972). See also Article 36.19, Vernon's Ann.C.C.P.

Appellant also complains of the trial court's action in admitting the testimony of three witnesses that his reputation for being a peaceful and law-abiding citizen was bad over objection that the witnesses were not properly qualified to state an opinion.

At the guilt stage of the trial, after the appellant had offered a number of reputation witnesses, the State called Joe Stone, a Lubbock police officer assigned to the juvenile division thereof. After Stone related he knew the appellant's reputation, he was taken on voir dire examination in the jury's absence. He related he had discussed appellant's reputation with a Mrs. Welch, who lived in the same block with the appellant, and two police officers. Appellant contends the testimony showed that the witness was relying upon his

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[3]In the event of a finding of guilty the jury's determination of whether the murder was committed with or without malice aforethought would control the range of punishment to be submitted to the jury at the penalty stage of the jury.

personal opinion and a discussion of specific acts of misconduct with the other persons and that it does not show he discussed the appellant's reputation. While the cross-examination by appellant's counsel was highly skilled, we cannot agree with his version of the testimony.

In Weatherall v. State, 264 S.W.2d 429 (Tex. Cr.App. 1954), relied upon by appellant, the testimony of the reputation witness "was not based on anything he had heard from other persons."

The State also called Roy Roberts and Gilbert Weaver, Principal and Vice Principal of the Dunbar High School, who testified appellant's reputation for being a peaceful and lawabiding citizen was bad.

Appellant argues that since the persons these witnesses had talked to about appellant's reputation were somehow tied to the school community as teachers, students, etc., they were not acquainted with his reputation outside the school community and their testimony should have been excluded. The record reflects the persons with whom the witnesses discussed reputation lived in Lubbock County, and the fact that they all had ties to the school community would affect the weight rather than the admissibility of the evidence.

Lastly, appellant contends that the court erred in refusing to instruct the jury not to consider the prosecutor's argument on the weight of public opinion at the punishment phase of the trial.

The argument complained of is as follows:

"MR. CHERRY: May it please the Court, ladies and gentlemen of the jury, like I said you have heard most of my speech. I talked to you about what is the object of our penal code. Two of them, one of them has to do with rehabilitation of the defendant, one with penalizing the defendant. The other deals with suppression of crime. I know that what I am asking you is no easy task, but I ask you to consider this: What are the school children in our public schools going to think —

"MR. BROWN: Excuse me, Your Honor, I object to this. This is improper argument for him to argue what the school children in our public schools are going to consider, and —

"MR. CHERRY: I withdraw it.

"MR. BROWN: — we move the Court to instruct the jury not to consider it for any purpose.

"THE COURT: The Court will decline to instruct the jury.

"MR. BROWN: Note our exception, please."

The prosecutor's argument is unlike those in Pennington v. State, 345 S.W.2d 527 (Tex.Cr.App. 1961), and Cox v. State, 247 S.W.2d 262 (Tex.Cr.App. 1952),

where in those cases, as relied on by appellant, this court held that the arguments were improper since they constituted an effort on the part of the State to induce the jury to convict the defendant because the people desired a conviction.

The argument in the instant case, though, is not an appeal to the jury to convict because of public opinion. See Bolding v. State, 493 S.W.2d 181 (Tex.Cr.App. 1973); Luna v. State, 461 S.W.2d 600 (Tex.Cr.App. 1970); Smith v. State, 418 S.W.2d 683 (Tex.Cr.App. 1967).

Appellant's final ground of error is overruled.

For the reasons stated, the judgment is affirmed.

Onion, Presiding Judge

(Delivered May 1, 1974)
Roberts, J., concurs in the result.

APPENDIX B

CLERK'S OFFICE,
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 47, 770, styled:

JEFF EARL CARVER,

Appellant,

versus

THE STATE OF TEXAS,

Appellee.

judgment of the 99th. Judicial District Court of Lubbock County, Texas, was affirmed on May 1, 1974, appellant's motion for leave to file motion for rehearing was denied on May 22, 1974.

THEREFORE with the denying of the leave to file appellant's motion for rehearing, this cause was disposed of by this Court on May 22, 1974, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, said judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas this the 8th day of June A. D. 1974.

/s/ GLENN HAYNES
GLENN HAYNES, Clerk,
Court of Criminal Appeals of
Texas

(SEAL)

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JEFF EARL CARVER,
Appellant,
versus No. 47,770

THE STATE OF TEXAS,
Appellee.

ORDER ON MOTION FOR STAY OF MANDATE AND FOR BAIL PENDING PETITION FOR CERTIORARI

On this 22nd day of May, 1974, came on to be considered the Motion for Stay of Mandate and For Bail Pending Petition for Certiorari filed herein by the appellant, Jeff Earl Carver, and in response to said motion it is Ordered, Adjudged and Decreed by the Court that the issuance of this Court's mandate in the above entitled and numbered cause shall be stayed for a period of thirty (30) days from this date.

It is so Ordered. Dated this 22nd day of May, 1974.

/s/ JOHN F. ONION, JR.
JOHN F. ONION, JR.
PRESIDING JUDGE

(SEAL)

APPENDIX D

Tex.Rev.Civ.Stat.Ann. art. 2338-1, Sec. 6.

Transfer and waiver of jurisdiction

Sec. 6. When a child under the jurisdiction of a court moves from one county to another the court may transfer the case to the court in the county of the child's residence if the transfer is in the child's best interest. The transferring court shall forward transcripts of records in the case to the judge of the receiving court, who shall file them in the office of his clerk.

(b) If a child is charged with the violation of a penal law of the grade of felony and was fifteen years of age or older at the time of the commission of the alleged offense, the juvenile court may, within a reasonable time after the alleged offense, waive jurisdiction by following the requirements set out in Subsections (c) through (j) of this section, and transfer the child to the appropriate district court or criminal district court for criminal proceedings.

(c) The juvenile court shall conduct an informal hearing under Section 13 of this Act on the issue of waiver of jurisdiction.

(d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.

(e) The juvenile court shall appoint counsel for any child who does not have retained counsel, and shall allow counsel at least ten days to prepare for the hearing. The presence of counsel at the hearing may not be avoided or waived. Appointed counsel is entitled to a fee for each day actually spent in court in the amount and from the same source as specified in Article 26.05 of the Code of Criminal Procedure, or any future amendment of that article.

(f) The juvenile court shall give counsel access to all the records relating to the child including the report of the investigation that must precede the hearing in the possession of the court, its staff, or employees. The juvenile court may refuse to reveal the source of any information if it finds that revelation would be injurious to the child or would prejudice the future availability of similar information. If the court refuses to reveal the source of any information and the child or his counsel objects to the refusal, the court shall preserve the identity of the source and make it available to the district or criminal district court if the child is transferred for criminal proceedings.

(g) After full investigation and hearing the juvenile court shall retain jurisdiction of the case unless it determines that, because of the seriousness of the offense or the background of the offender, the welfare of the community requires criminal proceedings.

(h) In making the determination under Subsection (g) of this section, the court shall consider, among other matters:

(1) whether the alleged offense was against person or property, with greater weight in favor of waiver given to offenses against the person;

(2) whether the alleged offense was committed in an aggressive and premeditated manner;

(3) whether there is evidence upon which a grand jury may be expected to return an indictment;

(4) the sophistication and maturity of the child;

(5) the record and previous history of the child;

(6) the prospects of adequate protection of the public and the likelihood of reasonable rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

(i) If the juvenile court retains jurisdiction, the child is not subject to prosection at any time for any offense within the knowledge of the juvenile judge as evidenced by anything in the record of the proceeding.

(j) If the juvenile court waives jurisdiction it shall certify its action, including the written order and findings of the court and accompanied by a complaint against the child, and transfer the child to the appropriate district court or criminal district court for criminal proceedings. Upon transfer of the child for criminal proceedings he shall be dealt with as an adult and in accordance with the Code of Criminal Procedure. The transfer of custody is an arrest. However,

the examining trial shall be conducted by the district court or criminal district court which may remand the child to the jurisdiction of the juvenile court.

(k) If the child's case is brought to the attention of the grand jury and the grand jury does not indict for the offense charged in the complaint forwarded by the juvenile court, the district court or criminal district court shall certify the grand jury's failure to indict to the juvenile court. Upon receipt of the certification the juvenile court may resume jurisdiction of the child.

SUPREME COURT, U. S.

FILE

JUL 18

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1912

JEFF EARL CARVER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. _____

JEFF EARL CARVER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet been reported. A copy of the opinion is attached as an Appendix to the Petition for Writ of Certiorari at page 1a to page 15a.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition, although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents two questions which he asserts should be reviewed by this Court. These questions as asserted by Petitioner are as follows:

1. Whether the prior recorded testimony of the absent witnesses Tue and Rogers was properly admitted in evidence under the exception to the Sixth Amendment confrontation requirement recognized in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

   A. Whether testimony of absent and unavailable witnesses, recorded at a previous juvenile jurisdiction certification hearing under Tex.Rev.Stat.Ann. Art. 2338-1, Sec. 6, (wherein guilt or innocence and self-defense are not relevant issues) comes within the exception to the confrontation requirement of the Sixth Amendment, which allows the admission in evidence of testimony recorded in a prior trial of the same defendant.

B. Whether the state made a good faith effort to produce the witnesses at trial, so that the witnesses were "unavailable", within the exception to the confrontation requirement of the Sixth Amendment if the armed services would permit the witnesses to appear but would not advance funds, the state law does not authorize the state or county to advance funds to out-of-state witnesses prior to the time of their appearance, and the state prosecutorial authority knowing of these matters, fails to request the armed services to direct the witnesses to appear.

2. Whether the Court of Criminal Appeals applied the correct rule of decision in determining "harmless error" in this case, specifically, whether the proper rule of decision is that articulated in *Fahy v. Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), or whether *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) altered the rule for determining the presence or absence of "harmless error".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment and the Sixth Amendment of the Constitution of the United States are involved herein, as well as Texas

Revised Civil Statutes, Article 2338-1, Section 6. The Petition at page 4 and Appendix D sets out these pronouncements.

STATEMENT OF THE CASE

During the morning of September 9, 1971, Jeff Earl Carver, Petitioner herein, then a fifteen (15) year old male student at Dunbar High School, Lubbock, Texas and Willie Collier, also a student at that school, had a confrontation over Collier's demand of a cigarette. During the confrontation, Carver apparently was scratched on the arm by tool used to open cardboard boxes which was held by Collier. Carver did not seek, nor did he receive, any medical treatment for this minor injury. At noon, Carver left the school with two acquaintances. These three went to Jeff Carver's home where Carver went in and secured a pistol and ammunition. The boys then went to eat lunch at a drive-in restaurant. Having eaten, the boys returned to Dunbar High School where Jeff Carver entered the school with the admitted intent of finding Willie Collier. Failing to find Collier, Carver went back outside the school building to wait for the next class change which was to occur in fifty-five (55) minutes. At approximately 2:40 P.M. on the afternoon of September 9, 1971, Jeff Carver entered Dunbar High School for the second time armed with the murder weapon for the purpose of finding Willie Collier. Upon finding Collier, Carver walked up behind him, tapped him on the shoulder with the loaded pistol, and when

Collier turned to face him, shot him once at point-blank range. The wound inflicted by Jeff Carver upon Willie Collier resulted in Collier's death minutes later.

On October 15, 1971, the 137th District Court of Lubbock County, Texas, sitting as a Juvenile Court, after a hearing on jurisdiction where live witnesses were heard, including John Tue and Randall Rogers, entered an order waiving its jurisdiction over Petitioner; and he was transferred to the 99th District Court of Lubbock County, Texas, for criminal proceedings. An indictment was returned by the Grand Jury on January 11, 1972, charging the Petitioner with the offense of Murder with Malice. A trial before jury was had on October 30, 1972, in the 99th District Court. The jury returned a verdict of guilty of the offense of Murder Without Malice, and punishment was assessed at five (5) years confinement in the Texas Department of Corrections.

An appeal from the jury verdict in the 99th District Court, Lubbock County, Texas, was perfected to the Court of Criminal Appeals of Texas. The Court of Criminal Appeals affirmed the decision reached in the trial court and issued an opinion so stating on May 1, 1974.

ARGUMENT AND AUTHORITIES

I.

THE PRIOR RECORDED TESTIMONY OF THE ABSENT WITNESSES TUE AND ROGERS WAS

PROPERLY ADMITTED IN EVIDENCE UNDER THE EXCEPTION TO THE SIXTH AMENDMENT CONFRONTATION REQUIREMENT.

The trial court was entirely correct in admitting the prior recorded testimony of Tue and Rogers. As the Court of Criminal Appeals very correctly stated in their opinion in *Carver v. State*, the law recognized in Texas, and not in conflict with provisions of the Constitution of the United States, is that when a witness has once testified in a case, on a preliminary hearing or on a former trial, and the accused was present and had the opportunity to cross-examine the witness, and such witness has since died, or resides out of state, or has removed beyond the limits of the State, or cannot attend the trial by reason of age or bodily infirmity, or has been prevented from attending court through the act or agency of the other party, his testimony may be reproduced in a subsequent trial of the same case if the proper predicate be laid for its admission. Article 39.01, Vernon's Ann. C.C.P. Petitioner asserts at page 8 of his Petition before this Court that because the hearing at which the testimony was recorded was a juvenile jurisdictional hearing and not an examining trial, the testimony should not have been admitted. Respondent asserts that this is little more than a question of semantics and that the juvenile certification process (as set out in the Petition, page 18a to page 21a) can certainly be considered no less than a preliminary hearing and thus in compliance with Article 39.01, Vernon's Ann. C.C.P., with regard to prior recorded testimony.

In considering the area of the Sixth Amendment right to confrontation, one must look carefully at its development to fully understand what protection is afforded. It has long been held, as Petitioner agrees, that the admission of prior testimony of an unavailable witness does not, in and of itself, violate the confrontation clause of the United States Constitution. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337 (1895). It cannot be disputed that an accused in a criminal case must have the right to confront and cross-examine witnesses against him. *Pointer v. State,* 380 U.S. 400, 85 S. Ct. 1065 (1965). It is important to realize, however, that the development of the law in this area has come about in an effort to protect defendants in criminal cases from having to face *ex parte* evidence in lieu of a personal examination and cross-examination. *Barber v. Page,* 390 U.S. 711, 88 S.Ct. 1318 (1968), *Green v. California,* 399 U.S. 163, 90 S.Ct. 1930 (1970).

Petitioner bases a great deal of emphasis on this Court's decision in *Barber v. Page, supra*, and Respondent asserts that a close reading of that case clearly shows why the trial court's action herein should be upheld. This Court made it abundantly clear in that case that the state authorities made no effort to obtain the personal appearance of a missing witness. *Barber v. Page, supra* at 1322. The testimony of Tue and Rogers would not be excluded by this Court's decision in *Barber v. Page* because the State did make a good faith effort to secure their testimony at Petitioner's trial. The evi-

dence shows that the witness Tue was in the United States Marine Corps stationed off the coast of Viet Nam (SF 61) and that the witness Rogers was in the United States Marine Corps stationed in North Carolina (SF 63). The State introduced evidence at trial of an application for out-of-state witnesses for PFC Rogers and PFC Tue. (SF 50). Also, Mr. Blair Cherry, District Attorney of the 72nd Judicial District of Texas, attempted to comply with the instructions given him by the commandant's office of the United States Marine Corps. (SF 64). The Judge Advocate's office in Washington, D.C., informed Mr. Cherry that he would have to advance money in order for the witnesses to travel to Lubbock. (SF 67).

While the Marine Corps insisted the money to finance these two witnesses' trip to Lubbock, Texas would have to be advanced, the laws of the State of Texas did not allow the state to advance money to subpoenaed out-of-state witnesses prior to their appearance. Opinions of the Attorney General, Nos. C-720 and M-863. In an opinion written by the Honorable Crawford C. Martin, then the Attorney General of Texas, in May, 1971, this law was interpreted as follows:

> Article 24.28, Texas Code of Criminal Procedure, contains no authorization permitting or directing the advancing of County funds to a subpoenaed out-of-state witness while such witness is waiting to be paid by the State. Accordingly, Counties are not permitted to make such advances to such witnesses. Such witnesses are to receive compensation solely from the State. Op. Atty. Gen., No. 863, p. 3.

A later opinion, written in January, 1972, made it clear that mileage and fees were to be paid witnesses obeying the summons. Opinion of the Attorney General, M-1038. Contrary to Petitioner's contention, the record reflects that Mr. Cherry did everything possible within the laws of the State to secure these witnesses for trial and made a good faith effort to secure their appearance. The District Attorney did not make an independent decision that the armed forces would not cooperate and therefore there was no need to pursue the matter. He made the request of the Marine Corps and was refused. While Petitioner contends in his Petition on page 13 that the language in *Barber v. Page* concerning the possibility of a refusal not being the equivalent of asking and receiving a rebuff is controlling in this case, the Respondent asserts that the facts herein make this portion of *Barber v. Page* wholly inapplicable.

The record reflects that the prosecutor in this case laid the proper predicate for the introduction of the two witnesses prior recorded testimony. The only real question remaining then is whether the prior recorded testimony used at trial was subject to cross-examination. Petitioner contends that this prior recorded testimony does not satisfy the requirements of the exception to the confrontation requirement of the Sixth Amendment because of a lack of opportunity for cross-examination at the certification hearing. Respondent would urge that Petitioner bases his entire argument in this area on cases where there was no cross-examination. Here, the

attorney representing Petitioner pursued vigorous cross-examination in what amounted to an examining trial. See *Garza v. State*, 469 S.W.2d 169 (1971). At this hearing, Petitioner was represented by one of the two lawyers that later represented him at trial, and the testimony of Tue and Rogers was taken under oath. As previously mentioned, the attorney for Petitioner had the opportunity and utilized the opportunity to cross-examine both witnesses. (SF 132-163, 178-200). Petitioner should not now be heard to say that even though cross-examination was allowed, it was not as thorough as it might have been because of some subjective understanding of his attorney. Respondent would assert that the proper test to be used should be whether or not there was an opportunity for cross-examination rather than the use made of that opportunity. As the Tenth Circuit has noted:

> The extent of cross-examination, whether at a preliminary hearing or at trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right. *United States v. Allen*, 409 F.2d 611, 613 (10th Cir. 1969).

Respondent reasserts that this prior recorded testimony was admissable, and no error can be attributed to the trial court's action in admitting it.

II.

THE COURT OF CRIMINAL APPEALS OF TEXAS CORRECTLY DECIDED THAT ERROR,

IF ANY, IN THE ADMISSION OF THE PRIOR RECORDED TESTIMONY OF TUE AND ROGERS WAS HARMLESS BEYOND A REASONABLE DOUBT.

The convication in this case certainly does not turn on circumstantial evidence as Petitioner seems to imply. There were many people present in that busy school corridor at 2:40 P.M. on the afternoon of September 9, 1971. A number of witnesses described the events just prior to and after the shooting, and several were eyewitnesses. The facts surrounding the shooting at issue here, as developed at trial, show that Petitioner went to his home, got a pistol, ate lunch at a drive-in restaurant, returned to school and after some delay, shot Willie Collier as Collier backed away from him. The testimony of Petitioner himself corroborates the testimony of the missing witnesses. Nevertheless, the testimony of three other witnesses, Donnell Hooper, Pamela Knighten and Danny Webb, specifically negates any self defense on the part of Petitioner in this shooting. There are, of course, numerous other witnesses testifying about Jeff Carver's having shot Collier, which Petitioner does not deny, and to a lesser degree, about the fact that Collier was not any threat to Jeff Carver in this incident. The evidence is overwhelming that the deceased was making every effort to separate himself from the presence of Jeff Carver and the weapon he carried.

The gravamen of Petitioner's contention concerning "harmless error" seems to be that the wrong test was used by the Court of Criminal Appeals in deciding this issue. Petitioner seems to urge that the proper test for deciding "harmless error" is found in *Fahy v. Connecticut*, 375 U.S. 89, 84 S.Ct. 229 (1963); and no other test or decision is applicable. Respondent asserts that *Fahy v. Connecticut* must certainly be viewed as limited to its own facts in light of the body of law produced in this Court since that decision. *Fahy v. Connecticut* has of course been interpreted to mean that all trial errors which violate the Constitution do not automatically call for reversal. *Chapman v. California*, 386 U.S. 19, 23, 87 S.Ct. 824, 828 (1967). In adopting the *Chapman* decision, this Court has written:

> We do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we can say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed. *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728-29 (1969).

The evidence against the Petitioner in the instant case is, as in *Harrington*, so overwhelming that, regardless of the taint on the admission of the prior recorded testimony, the admission of that evidence was "harmless error" beyond a reasonable doubt.

CONCLUSION

For the reasons above stated, Respondent asserts that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief for Respondent in Opposition was served on the attorneys for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Clifford W. Brown, Brown & Harding, 1601 Broadway, Lubbock, Texas 79401 and Mr. Thomas L. Clinton, Court Place, Lubbock, Texas 79401 on this the _____ day of July, 1974.

GILBERT J. PENA
Assistant Attorney General